

Transactions *of* The Chartered Surveyors' Institution

SESSION 1938-1939.

AT THE ORDINARY GENERAL MEETING

*Held at the Chartered Surveyors' Institution on Monday,
3rd April, 1939.*

Sir CHARLES BRESSEY, C.B. (President), in the Chair.

NEW MEMBERS.

The following new members were received by the
PRESIDENT prior to the meeting and signed the Register:—

Professional Associates :

BAKER, CHARLES WILLIAM
EDWARD
KEEBLE, LEWIS BINGHAM

RIGBY, HUGH MARSHALL
ROBERTS, JOHN SANDFORD

A DISCUSSION took place on Mr. THOMAS E. SCOTT'S paper entitled

AIR-RAID PRECAUTIONS :

With special reference to the duties of Surveyors.

The PRESIDENT, in calling upon Mr. Scott to present his paper, said that no one could complain that this was not a topical subject. The author had taken great interest publicly and privately in air-raid precautions. He himself had had the advantage of serving with Mr. Scott on certain committees which the Government had set up to deal with the rather abnormal circumstances under which the people of this country lived at the present time. The work commonly known as A.R.P. concerned architects, surveyors, and engineers. On the following day he would be serving on a committee set up by the Lord Privy Seal to secure collaboration between those three professions in such matters. Mr. Scott was able to speak with great authority from the architect's point of view, and they as surveyors had everything to gain by the pooling of the knowledge which representatives of the three professions could bring to the subject.

Mr. Herbert Ryle, who would propose the vote of thanks to Mr. Scott, was Chief Maintenance Officer of His Majesty's Office of Works.

Mr. HERBERT RYLE, C.V.O., O.B.E. (Chartered Surveyor), in proposing a vote of thanks to Mr. Scott, said that no one had a better knowledge than himself of the amount of work the author had put into this question. For several years Mr. Scott had been engaged on the Structural Precautions Committee of the Home Office, and it had been very largely due to his persistence that any sort of issue had emerged from the considerations of that Committee. The subject was so large that it was almost impossible to arrive at a decision on any one thing. It became essential, therefore, for some line to be drawn, and the architects, led by Mr. Scott, rather forced the issue, and eventually recommendations were made.

The paper was well timed. It did not purport to be the final word on A.R.P., but merely an outline of essentials as applied to buildings. Mr. Scott was right when he said that the question of shelters was the really vital one at the present moment. The

fundamental question was what standard of protection was to be provided. People talked about shelters for those who lived in towns, but in fact every citizen required three shelters—one at home, one at his work place, and the third to be one into which he could dive when going from one place to the other. Therefore these individual estimates had to be multiplied by three.

The Civil Defence Bill now before Parliament gave some indication of the standard of protection which the Government had decided to adopt in the first instance, and it seemed to be the idea that citizens should receive protection in all those three situations against blast, splinters and *débris* at the minimum, but not against the effect of a direct hit or a miss near enough to be regarded as a direct hit. Such protection could be achieved relatively cheaply and quickly, whereas the protection against a direct hit was an entirely different matter. It was not a question of increasing the degree of protection along that particular line, it was something entirely different. Between those two aspects of protection there was a very big gap. What was adequate for protection against blast, splinters and *débris* was far below the requirements for full protection. Unless the degree of protection which they set out to provide was kept clearly in view, and also the risks which were going to be accepted, there was a possibility that money would be spent on attempting to achieve some intermediate degree of protection by means which might involve really an added danger rather than otherwise.

He agreed with the author's suggestions for dealing with the problems, and he thought they were practical. There was no subject on which it was easier to generalise than A.R.P., and no subject in which it was more difficult to apply general principles to particular instances. The Government proposed to issue a code in connection with the Civil Defence Bill which would set out the minimum degree of protection and the methods of providing it. But that code would not provide shelters, and its application would call for all the skill of the architects and surveyors of this country if it was to be interpreted in a reasonable and economical manner.

In the Government buildings of London basements were being strengthened. Very nearly two hundred London buildings had been dealt with up to the present moment, and he could almost say that in no two buildings or no two rooms in one building had it been possible to apply the same treatment for the strengthening of roofs and floors. The difficulties in the way were very considerable if the existing services were to be kept going and obstacles avoided.

The Bill raised many problems of interest to surveyors other

than those covered by the present paper. The question of the provision of shelters in industrial premises would no doubt provide quantity surveyors with a great deal of work. The provision of public shelters by local authorities who were given powers to enter premises and carry out works subject to compensation for disturbance and impairment of permanent value would also provide a great deal of work for surveyors. Another matter on which Mr. Scott had not touched, but which was bound to arise, was the protection of vital plant and machinery against blast and splinters and the devising of methods whereby buildings could be kept in use even if partly damaged.

Codes relating to new buildings were already in force in Germany and in France, and he had no doubt that a code to be adopted in this country would probably be on somewhat similar lines. In new buildings it should not be difficult to provide a very considerable degree of protection at a relatively small cost. It would be possible to design buildings which would not have the same tendency to collapse or would not create a very large amount of *débris*. It would be possible to have a strong floor without all the expense of strengthening existing basements. In course of time dwellers in cities should have very little fear of air attack when the policy which was outlined in the Bill was put into operation.

Mr. C. S. BURKETT-SMITH (Chartered Surveyor), in seconding the vote of thanks, said that Mr. Scott had given the Institution a comprehensive view of the problems of A.R.P. It was also a sane and balanced view. There were no text-books on this subject. Those who were in private practice had had to grope their way through the various reports in the press and the translations of brochures issued by foreign governments. One of the most valuable reports was that issued by the Association of Architects, Surveyors, and Technical Assistants.

Few of those who had looked over the fortified or semi-fortified buildings in which their ancestors had lived in mediæval times could ever have supposed that they would have to consider protecting their own homes by semi-fortifications, this time against attack from a new element, the air. Very little in the matter of providing protection had been done by the property owner, either landlord or occupier, during the last few months. That was deplorable, but perhaps excusable because there had been so little definite guidance to give him. It had been impressed upon the property owner in the daily press that there was no protection against a direct hit, except schemes of a massive character, to such an extent that the average owner or

occupier appeared to have almost come to the conclusion that other precautions were useless. That idea, Mr. Burkett-Smith hoped, might be dispelled, and the debates on the Civil Defence Bill would focus the attention of property owners on the necessity of dealing with that matter from the point of view of protection against splinters and blast, which was the maximum protection the majority of them could expect to receive. The question was largely one of cost. The property owner was apt to come and say "I want one of my basement rooms made "bomb-proof." It had to be explained to him that it could not be made bomb-proof but that the best would be done to make it splinter-proof or blast-proof; then the property owner thought that an expenditure of £15 or £20 would cover it, and when he found that the cost was likely to be much higher he often did not care to go on with it.

He thought the cost of shelters generally would have to be met by some form of assistance. It might be dealt with by means of Government loans. Anybody constructing an approved shelter on his property should be able to obtain an advance from the Government by way of first mortgage at a rate of interest not exceeding 3 per cent. per annum, the loan to be repayable over a term of years, perhaps not less than ten. Such a loan could reasonably take priority over all other charges. Building societies might consider the advisability of making advances to their borrowers on similar lines—certainly a live borrower must be better than a dead one!

Was it correct to speak of areas outside London as being "safe"? The speed and range of modern aircraft was such, and the possibility of enemy aeroplanes getting detached from their main formation and fighting and dropping their bombs anywhere was so likely, that it was difficult to say that any area within a radius of 25 miles of London, or any large city, was safe.

To those who had to deal with the old London houses with their basements and weight-bearing walls, the strengthening of such basements brought a different problem in almost every case. There would never be a decent protection in basement-strengthened rooms in the older part of London unless exits could be taken through party-walls. The exit should be at a distance equal to not less than half the height of the external wall if it was not to be choked by débris. If a sensible scheme was to be worked out it must provide for access through party-walls and gardens.

In the districts of smaller houses it did seem a pity that some of the labour at present spent on making roads, other than those

necessary for military requirements, was not directed to erecting shelters in the poorer quarters. The erection of shelters in gardens, say, for groups of six small houses, was a most urgent matter.

Mr. D. S. JONES (Professional Associate) said that Mr. Scott had stated that there was hardly any information about what was recommended for A.R.P.; therefore it might be well to draw attention to the Report on A.R.P. compiled by the Institution of Structural Engineers, which he could recommend. One point it made was with reference to the Home Office suggestion that basements, given certain conditions, might be selected as places for refuge. The report to which he was referring drew attention to the fact that a basement might well prove more dangerous than a ground floor in view of the possibility of broken gas mains and the collapse of structures above. The committee which prepared that report believed that there was considerable risk in a basement in many buildings, in view of the character of the superstructure, and they recommended instead shelters in dug-outs outside.

Mr. K. E. B. GLENNY (Fellow) said that he had been glad to hear Mr. Scott stress so much the need for standard protection. An idea was prevalent that it was the Government's duty to provide everybody with complete protection, either by deep shelters or a scheme of evacuation, forgetting that people had to carry on the essential services. The individual in the next war would only be important in so far as he was producing anything of offensive or defensive value, and the man in his home, provided that his wife and children had already been evacuated, was only entitled as a citizen to the protection which the Government proposed to provide by means of those iron shelters. Only when he was working in a productive capacity in the mass was he of value. Therefore it was in the factory or office or in Whitehall that possibly a deep shelter policy was necessary. He mentioned Whitehall because it was, after all, the nerve centre of the country.

Mr. Burkett-Smith had touched by inference on the question of the £250 limit which divided those who were to receive shelters free and those who were to pay for them. There was a good deal of resentment on that score, first from those who objected to making any return of income, and second from those just above the income limit. The Government might have been a little bit more far-sighted, and if they must impose a means test, have imposed it effectively, not instituting a sharp dividing

line of income, but provided a graded payment for those who had more than £250 a year. It was said at the present day that those who were paying nothing towards those shelters were the first to receive them, and that many above the limit who would have to pay for them could not at present obtain them at all.

Mr. Scott had referred to the duties of local authorities. In many cases the local authorities were regarding A.R.P. as merely an extension of their normal functions and were chary of calling in outside assistance. A.R.P. was by no means an exact science, but there did seem a reluctance on the part of local government officials to acknowledge that they might not be right, and an accompanying unwillingness to ask those outside for the benefit of their experience.

The problem of deep shelters had been referred to by Mr. Scott. He had suggested that they should be available on the warning of an air raid within three or four minutes. Did he mean that people should be able to reach them in that time, or get into them? If there was a direct hit anywhere near the shelter while the people were crowding in, it seemed likely that there would be much more slaughter than if they had remained in their own gardens.

In Barcelona, he believed, there were no anti-aircraft guns, and very little air defence. Therefore most of the bombing was low and compelled people to take deep shelter, and there were many more direct hits on a small target.

Mr. J. P. RHYS (Fellow) said that the paper was one obviously which set surveyors to work on the subject, but the subject was so vast that Mr. Scott could only suggest certain channels which they might explore. Working along the lines he had indicated, many of them would find themselves drawn to certain strange conclusions.

His own personal predilection, after having had experience of bombing in various situations in the last war, was for open fields. But what he was rather disturbed about was the question whether, in houses now being constructed, in order to guard against air raids it would be necessary to have always on the premises some sort of A.R.P. shelter, which was almost equivalent to having one's coffin standing on the sideboard in the dining-room! It also disturbed him to think that when people rushed out of their houses to get into shelters, questions of proper clothing, of sick people, of children would all have to be taken into account, and he could not help feeling that a large proportion of the population would undertake to stick it

out in bed rather than take cover. Probably it was only in the more congested areas that there would be any rush to cover.

Then there was the question of flooding. In low-lying areas, particularly in London, not a great deal of attention had been paid to the results likely to follow if the canal banks or the Thames Embankment should be broken, or sewers be blown up. That was another reason why the basement room was a doubtful proposal. In the Civil Defence Bill, as far as he could see, tenants were going to be encouraged to erect steel shelters in their gardens, with the possibility of damage being done to sewers. Without supervision there was likely to be certain amount of damage to soil and surface-water drains.

Finally, what was going to be the effect on property values, on the one hand, property having a suitable air-raid shelter, and, on the other hand, property without?

Mr. E. R. CANHAM (Fellow) said that he had been impressed by the comments at the end of the paper as to what could be done in the case of future buildings. He was thinking in particular of the smaller houses. Mr. Scott's hints as to how a house of that kind could be strengthened were most valuable.

On the subject of protection generally he agreed with Mr. Glenney. He recalled a "black out" which he had recently experienced, an involuntary one due to a breakdown at the electricity station, when it was necessary to use candles. The experience had led him to feel that shelters should be many and small and get-at-able without aggregating many people in the same area.

Mr. R. S. BEVAN (Fellow) agreed with a previous speaker that when it came to being bombed or shelled there was nothing equal to a trench in the open field for safety. In preparing for a possible evacuation it was most important to do away with bottle necks on main roads. These existed on some of the most important roads in the immediate neighbourhood of large towns and cities—he mentioned one, namely, Aylesbury. A bottle neck on a main arterial road in a case of hasty evacuation would disorganise the whole road system for miles around, and create a target which would appeal to an enemy in the air, and if there was anything more terrible than being bombed or machine-gunned on a crowded road he had yet to know of it. He suggested that something should be done in the way of providing "pill boxes" or deep dug-outs for traffic control men who would have to be at certain points at all times. Another point which needed the most urgent attention was that of rural water

supplies. If millions of people were to be turned out of large cities into rural areas he rather wondered what would happen. He had been astonished at the state of water supplies in many small towns and villages. If these places were swamped by people from the crowded areas the water supplies might well be a very grave problem.

Mr. THOMAS E. SCOTT, in replying on the discussion, took up first the question of protection of plant mentioned by Mr. Ryle. Very obviously, in both works of national importance and in works which were of only minor or more or less individual importance, everything possible ought to be done to protect equipment, particularly vital equipment. A case was cited of one very large factory in which about 15,000 people were engaged on the manufacture of munitions. It was impossible to put the machines and plant into a shelter, but it was possible to provide protection against some of the more widespread effects of high explosive bombs by erecting comparatively low screens, thick enough to resist the splinter effect of a 500-lb. bomb bursting 50 feet away. Similarly it was possible to provide a reasonable degree of local protection to boilers and generating plant. The whole of the boiler-house with its glass roof could not be protected, but provision could be made for the rapid erection of a tubular steel screen that would be covered overhead with boarding and sandbags thick enough to keep out small fragments of anti-aircraft shells, and laterally protected with boarding and sandbags thick enough to keep out splinters. In the same building it was necessary to devote a certain amount of attention to one other problem which escaped the attention of many people, namely, the cashier's office. Should a raid occur on pay day when the wages for 15,000 people were on the premises, the consequence might be serious. He mentioned this in passing to emphasise the point that there was hardly an aspect of industrial or private life that had not to be considered in the planning of an A.R.P. scheme.

Mr. Burkett-Smith had referred to the protection afforded by a trench. Those of them who had had any experience in France would know that against everything except a direct hit a trench provided first-class protection. There were two main objections to trenches. The first was that adequate open space was necessary in which to construct a trench system. The second was that an open trench was not a very suitable place for women and children to go to, particularly at night. He was afraid that if war had come last September very few trenches in the London parks would have been tenable.

As to the provision of shelters in gardens, he had been in touch with one of the London boroughs where the proposal was now to build small concrete shelters which would give a degree of protection against blast, splinters, fragments of bombs, and débris, and to provide it within easy reach of everybody. Each shelter might accommodate twenty to forty people; people would take shelter in families, and there would be little risk of the spread of panic. From every conceivable point of view he thought those small shelters in gardens would provide a very much happier solution than the deep collective shelters. He was not quite sure from the tone of one or two speakers that they did not regard him as an advocate of deep shelters. He was not.

Mr. Jones had read extracts from the report of the Institution of Structural Engineers. He had an idea that Mr. Jones had read those extracts in order to point out that there was a certain amount of information or data available in them. Mr. Scott happened to know something about many of those recommendations. Many of the points raised in that report would be found in the "Journal of the Royal Institute of British Architects" and other publications which were available to the public before last November when the report in question was issued. But he still said that all the recommendations, with the possible exception of a few figures quoted from foreign handbooks, did not represent technical data; they represented common-sense. It did not take a scientist to decide whether there was a risk of flooding in the basement or not. It did not call for any great degree of technical knowledge or scientific ability to decide whether it was better to get below ground or above, or whether it was wise to take shelter in a basement under a building which contained a great deal of heavy machinery, or a basement where the floors above were reasonably strong but did not carry abnormal loads. There was not very much scientific data available, or necessary, but A.R.P. provided an excellent opportunity for the use of common sense.

One participant in the discussion had spoken in not very glowing terms about local authorities. A lot of mistakes would be made in A.R.P.; some were unavoidable, but one could only hope that events in the future would not prove them to be mistakes instead of optimistic and enthusiastic efforts.

One speaker had suggested that deep shelters had been necessary in Spain because of the inadequacy of the anti-aircraft defence. He was not quite sure that that argument was one that ought to be advanced, particularly in relation to built-up areas. It might be true that an aeroplane could bomb more

accurately if it could get down to 5,000 feet, but in a built-up area of several square miles it did not matter much whether the aeroplane was flying at 5,000 feet or 20,000 feet, because it stood a reasonably good chance of hitting something, and he was afraid the shelter problem in built-up areas had to be decided without reference to accuracy in bombing. It was a problem which might be studied first along scientific lines, but would finally have to be studied as a problem of psychology and common-sense.

As to shelters in small houses, he believed it was possible to provide very nearly the same degree of protection in a small £700 or £800 house as in a £100,000 block of flats—the same degree of lateral protection (that is, protection against splinters and blast) and the same degree of overhead protection against demolition effects and fragments of anti-aircraft shells. In a small building the *débris* effects could not be so serious as they might possibly be in a multi-storey block of flats, and therefore it was not necessary to have the same degree of overhead protection.

The problem of the shelter in the small house had been considered, and the opinion was that possibly for less than £25 in a new building it would be possible to provide that degree of protection which he believed the Government would standardise in the Civil Defence Bill. In other buildings the same degree of protection could be provided without interfering in any substantial way with the efficient planning of the building.

In his paper he had referred to three main types. The first was the basement in which lateral protection against blast and splinters was more or less automatically provided, also protection from collapse of the superstructure by means of a strong floor. Staircases and corridors must also be protected, and if the staircase was contained in a well-constructed tower more or less isolated structurally from the rest of the building there was a good chance that it would remain standing should the upper part of the building be demolished. If the tower remained standing at least a couple of storeys high it would provide an escape for people occupying the shelter.

The second type of shelter was the internal corridor. In many types of buildings there was an internal corridor, sometimes with a window at either end or lighted only by borrowed lights across the rooms. In a new building the floors of each of these corridors could be made as thick as was economically practicable, with the floor under the topmost shelter corridor at least strong enough to support the *débris* loading, and the corridors would be connected at either end with a well-constructed staircase tower. Thus the building would have adequate pro-

tection, function quite satisfactorily in peace time, and there would be no interference with architectural treatment or with the amenities or efficiency of the rooms fronting on to the street.

The third type was the provision of the staircase tower. There were many buildings which had external walls consisting almost entirely of glass, such as factories and other buildings which must, to be efficient, have an uninterrupted floor space extending from wall to wall. But they always had staircases, lift shafts and landings, small offices, lavatory accommodation, and the like, which could be grouped together and put into a tower, if necessary lighted artificially and ventilated mechanically, with external walls made thick enough to provide the standard of protection. A shelter of this kind could very easily be added to many of the modern factories which at present in the ordinary way would not provide the least degree of protection for the people working in them.

He believed those who were concerned with the design and construction of buildings for peace-time purposes would find a solution to this A.R.P. problem which would not destroy the amenities and efficiencies of every-day existence, nor add much to the cost of building. He mentioned a large council office built for a county authority and provided with shelter accommodation up to the standard he had laid down. He believed the protection cost between £2,000 and £3,000 on a £100,000 contract, shelter accommodation was provided for 400 persons, and the whole building was protected from incendiary bombs.

The PRESIDENT, in putting the vote of thanks to the meeting, said that as regards A.R.P. the Government told them that they had not fallen behind other nations. In the matter of the distribution of gas masks he believed Britain led the way. He also referred to the provision which had been made in the basement of the Institution's building with the object of providing the degree of shelter the author had described.

The vote of thanks was carried by acclamation, and in response Mr. SCOTT said that if this paper and the discussion had contributed in any way towards reducing A.R.P. to something like a professional problem he was well rewarded for any effort of his own.

PAPER 591.

RIGHTS OF WAY.

By W. R. Hornby Steer, M.A., LL.B.

(Recorder of South Molton).

Paper to be discussed at the Ordinary General Meeting of the Chartered Surveyors' Institution on Monday, 8th May, 1939.

PRIVATE RIGHTS OF WAY.

A "right of way" may either be public or private in character, and for the purposes of this paper it will be convenient to deal first with the characteristics of a private right of way. That is, the right of one person to pass over land belonging to another, irrespective of any such right being enjoyed by the public generally. A private right of way is an easement enjoyed by a person in respect of his estate or interest in a particular piece of land usually known as "the dominant tenement," the land over which the right is exercised being called "the servient tenement."

Such a right may originate in various ways ; for instance, it may be the object of an express grant by the owner of the servient tenement, or it may arise by implication of law as where both dominant and servient tenements have been in the common ownership of one person and one or other of the tenements have been disposed of in circumstances which have created an easement of necessity ; or a private right of way may be established by prescription. Prescription may occur in any one of the following ways :—

- (a) Unexplained continuous user of an easement as of right for a period of twenty years is *prima facie* evidence of a right by prescription at common law. This presumption, however, may be rebutted for various technical reasons ;

- (b) A lost modern grant of the easement may sometimes be inferred in circumstances where a right by prescription at common law cannot be established ;
- (c) Under the Prescription Act, 1832, a private right of way is *prima facie* established by showing that it has been actually enjoyed by a person claiming the right without interruption for twenty years ; after being so enjoyed for forty years, the right, subject to certain exceptions, is absolute and indefeasible.

PUBLIC RIGHTS OF WAY.

In distinction to a *private* right of way, a *public* right of way is a right enjoyed by members of the public at large to pass along a highway. It will be noted that such a right can exist only over a highway, that is, a way over which all members of the public are entitled to pass and repass without permission of the owner of the soil.

The public right of passage over a highway may be a right to drive vehicles or it may be limited to user as a bridle way, as a drift way, or as a footpath. The public enjoy a right of passage over a highway whether or not it is repairable by the highway authority.

Sometimes a highway has a statutory origin such as some public Act of Parliament, as, for instance, the Development and Road Improvement Funds Act, 1909, or some private Act, or some provision contained in an enclosure award, a town planning scheme or a diversion order of Quarter Sessions.

Apart from public rights of way that have been created by or in consequence of some statute, such rights can originate only by reason of a dedication, express or presumed, by the owner of the soil and the acceptance thereof by the public. A way dedicated by the owner to the use of the public becomes a highway when accepted by the public. It is a question of fact and not of law whether or not there

has been such a dedication and acceptance. The intention of an owner to dedicate may be expressed in writing or orally ; but in most cases it is a matter of inference which may be drawn from the conduct of the owner having regard to the surrounding circumstances, and in particular the evidence of public user. At common law an intention to dedicate a highway to the use of the public can only be inferred against a person who at the material time was legally entitled to make such a dedication. It is worthy of note that statutory bodies may dedicate and may be presumed to have dedicated public rights of way over land vested in them for the purpose of their statutory undertakings. Such dedication may be inferred from evidence of public user unless the circumstances are such that the use of such a way by the public as a highway is incompatible with the purposes for which the land is vested in the statutory authority. Examples of such a presumed dedication by a statutory body are the many public rights of way now existing over the towpaths of canals.

Acceptance of a way by the public for the purpose of public passage requires no formal act of adoption by any highway authority, but may be inferred from evidence of open and unobstructed user by the public.

THE COMMON LAW.

Prior to the passing of the Rights of Way Act, 1932, all disputes as to public rights of way were governed by the common law, and many difficulties arose in cases where alleged rights of way were denied by owners. There was, for instance, no statutory direction (as in the case of private rights of way) as to what period of public user was sufficient to raise a presumption of dedication.

Further, where the way in question lay over settled estates, even though the way might have been used by the public for many years, considerable difficulties were sometimes experienced in proving that public user existed at a time when there was an absolute owner capable of making an effective dedication.

Difficulties of this character led to litigation often involving considerable uncertainty, expense and inconvenience. A long series of cases culminating with the judgment of the House of Lords in *Folkestone Corporation v. Brockman* (1914, A.C. 338) established that proof of long continuous and uninterrupted user of a way by the public, though evidence from which dedication might be inferred, did not create a presumption of law in favour of dedication which unless rebutted must prevail, and it was necessary for the claimants to prove not only public user but also dedication by the owner ; that is to say, the burden of proof was on the claimants to establish that an owner had dedicated the way.

Thus, in some instances where there might be strong evidence of unobstructed user by the public as of right over a long period of time, the claimants might fail to establish the right by reason of being unable to discharge the onus of proving that there was at a material time an owner who could effectively make a dedication and that such an owner had in fact made such a dedication.

For over a quarter of a century efforts had been made by the Commons, Open Spaces and Footpaths Preservation Society to secure the passing of an Act which would apply to public rights of way the principles contained in the Prescription Act, 1832, relating to private rights of way, and thus enable disputes as to alleged public rights of way to be determined in a simpler, less expensive and more equitable manner.

As a result of the efforts made by the Society and those associated with them, there eventually appeared on the Statute Book the comparatively short but none the less important enactment known as the Rights of Way Act, 1932, which came into operation on the 1st January, 1934. This Act substantially affected the law relating to this subject, and it will be well to consider its provisions in some detail.

A RECENT LEADING CASE.

The leading case on the interpretation of the Act is that of *Jones v. Bates* (1938, 2, *All England Report*, 237) in the Court of Appeal, in which the author appeared for the successful appellants. Of particular interest is the judgment in that case of Scott, L.J. (an honorary member of the Institution), in which the changes effected by the Act are examined at considerable length. This important and erudite judgment should be most carefully studied by all those desirous of understanding the present legal position.

The principal effect of the Act is that it is no longer necessary for claimants to prove that there was at a material time an owner capable of dedicating, nor it is now necessary for claimants to establish dedication by an owner. On the contrary, proof of user by the public as of right and without interruption for the prescribed period now creates a presumption of law in favour of dedication against the owner. In other words, claimants have merely to prove the necessary user, and the burden of proof then lies on those denying the public right to rebut the presumption of dedication. The Act does not apply to any way of such a character that user thereof by the public would not give rise at common law to any presumption of dedication, as, for instance, ways over land belonging to statutory authorities which they are unable to dedicate because of some provision in a private Act.

THE RIGHTS OF WAY ACT, 1932.

Section 1 (1) of the Rights of Way Act, 1932, provides that where a way has been actually enjoyed by the public as of right and without interruption for a full period of *twenty* years, such way shall be deemed to have been dedicated as a highway. This presumption may be rebutted if the owner can establish that there was no intention during that period to dedicate the way or can establish that during that period there was not at any time any owner capable of dedicating.

Section 1 (2) provides that, after *forty* years user by the public as of right and without interruption, the way shall be deemed *conclusively* to have been dedicated as a highway unless an owner can establish that there was no intention during that period to dedicate ; that is to say, that even if an owner can establish that there was not at any time any owner who was capable of dedicating, the presumption of dedication still prevails. Each of the respective periods of twenty and forty years are deemed to be the period next before the time when the public right shall have been brought into question.

To be effective the public user must be user "as of right." This expression was interpreted by Tomlin, J., in *Hue v. Whitely* (1929, 1 Ch. 440, at p. 445), as meaning "believing themselves to be exercising a public right to pass from one highway to another." It would be open to an owner to rebut such a contention by establishing that such user by the public was by violence, by stealth or by permission.

The Act also requires that the public user shall be "without interruption," that is to say that the public have used the way for the prescribed period and have not been interrupted. The expression "interruption" does not mean that the proved public user is only intermittent, but has been interpreted by Hilbery, J., in *Merstham Manor, Limited, v. Coulsdon and Purley U.D.C.* (1937, 2 K.B. 77) as meaning any "actual and physical stopping of the enjoyment," examples of such are the closing from time to time of private ways so as to stop the enjoyment of them by the public. Mere challenges to the public right are not interruptions within the meaning of the section unless they are accompanied by an actual stopping of the public user.

RIGHTS OF LANDOWNERS.

The Act provides for methods by which an owner can establish that he had no intention to dedicate a way to the public use. This may be done by maintaining an appro-

priate notice visible to those using the way (Section 1 (3)). Such a notice will negative any presumption of dedication by the owner unless there is proof of such an intention. In order to rebut an intention to dedicate a way to the public use, a landlord is entitled to place and maintain such a notice on land in the occupation of his tenant (Section 1 (5)). Further, an owner is entitled to deposit with the county council and with the borough or district council a map of his property prepared in the manner specified, accompanied by a statement indicating what ways he admits to have been dedicated as highways (Section 1 (4)); subsequent statutory declarations which comply with the requirements of the section will negative the presumption of dedication of additional rights of way over the property thus delineated, unless the claimants can prove an intention to grant a right of public passage. As has been shown, a public right of way may, since 1934, be established over private property merely on evidence of public user. It is important, therefore, that owners, and those responsible for protecting the interests of owners, should now take such action, by the maintenance of notices or otherwise, as may in the particular circumstances be appropriate, in order to prevent new public rights of way being established over private property where owners do not intend to dedicate highways to the use of the public.

It is important to note that the Act does not prevent the dedication of a highway being presumed in circumstances in which it could be so presumed at common law before the passing of the Act. That is to say, the dedication of a highway can be presumed as hitherto on proof of uninterrupted public user as of right, although the period of such user is less than twenty years (Section 2 (2)).

DOCUMENTARY EVIDENCE.

An important change in the law of evidence is effected by Section 3, which provides that, before determining if and when dedication took place, the Court must take into con-

sideration any map, plan, history or other relevant document that is tendered and that such weight shall be given thereto as the Court consider justified by the circumstances. Those with experience of litigation will readily appreciate how this provision can facilitate the task of proving or rebutting a public right of way. For the Court must now receive in evidence all maps whether they have been prepared in the course of a statutory duty or merely for some private purpose, or whether they are produced by the cartographer or by some other person. Moreover, important documents which formerly could not be received in evidence are now admissible.

It will be observed that the provisions of Section 3 appear to go considerably further in making such documents admissible than do the more recent provisions of the Evidence Act, 1938, which extend the admissibility of documentary evidence in civil proceedings generally.

The provisions of the 1932 Act relating to the admissibility of documentary evidence will be of especial value in cases where the question at issue is whether or not a particular road was a public carriage way prior to the 20th March, 1836. This question is likely to arise in the course of building development such as is now taking place in rural areas where houses are being erected alongside old and hitherto little used public carriage ways which have not been taken over by the highway authority. In such circumstances the frontagers may escape the heavy liability of making up the road in accordance with the Public Health Act, 1875, or the Private Streets Works Act, 1892, if they can produce satisfactory evidence of the right in question having been enjoyed by the public before the coming into operation of the Highway Act, 1835. It is in such cases that the production of old estate maps and other documents, now made admissible, may be of great assistance in determining whether the liability for making up the road falls on the frontager or on the highway authority.

DUTIES OF DISTRICT COUNCILS.

Apart from any liability to repair, District Councils in particular are specifically invested by Section 26 of the Local Government Act, 1894, with the duty of protecting public rights of way. These duties were expressly preserved to both Urban and Rural District Councils by Section 30 of the Local Government Act, 1929, when the liability to repair was transferred from Rural District Councils to County Councils.

Section 26 of the 1894 Act places on every district council the duty to—

- (1) protect all public rights of way, and
- (2) prevent as far as possible the stopping or obstruction of any such right of way (whether within their district or in an adjoining district in the county or counties in which the district is situated), where the stoppage or obstruction would in their opinion be prejudicial to the interests of their district, and
- (3) prevent any unlawful encroachment within their district on the strips of land lying between the metalled highway and the adjoining property usually known as roadside waste, and
- (4) take proper proceedings when a parish council has made representations concerning an unlawful obstruction to such a public right of way or to an unlawful encroachment of such roadside waste.

District councils are expressly empowered by this section to institute or defend any legal proceedings that may be necessary in order that they may discharge the duties referred to above. If a district council fail or refuse to take any proceedings in consequence of a representation by a parish council, that parish council may petition the county council, and the county council may resolve that these powers and duties of the district council shall be transferred to the county council.

A POSSIBLE DANGER.

The coming into operation of the Act of 1932 has rendered it necessary for district councils to be especially concerned in the protection of public rights of way for the following reason: If an owner now maintains a notice or deposits a map in accordance with the provisions of that Act in respect of a way that is in fact a public right of way, and such action goes unchallenged, the public rights are likely to be lost, although the owner may still permit the public to use the way as an act of grace. This is because any presumed intention to dedicate after the date of erecting the notice or depositing the map can be thereby negated, and as the years go by it will be increasingly difficult to prove public user before that date by reason of the fact that those who used the way before the erection of the notice (or before the depositing of the map) may be no longer alive to give evidence. Thus, if the owner after a period of years then closed the public right of way, it is probable that he could successfully deny the public right and the enjoyment of the way would be lost to the public for ever. It is therefore essential that district councils should now take all appropriate steps to preserve public rights of way while the necessary evidence is readily available. Merely to leave such questions open is likely to result in valuable public rights of way being eventually obstructed.

Since the coming into operation of the Act very many instances have arisen in which there was at first a difference of opinion between a local authority and an owner as to the status of some way ; but in almost all instances these differences have been settled amicably between the parties concerned. Only in rare cases has it been necessary to resort to litigation.

REDUCING COSTS OF LITIGATION.

The traditional procedure in disputes of this character was for the owner or the claimant, usually the district council, with the fiat of the Attorney-General, to commence

proceedings in the High Court of Justice claiming a declaration as to the status of the way and an appropriate injunction. In such proceedings a substantial sum might be incurred in costs, and considerable difficulties sometimes arose in bringing aged or infirm witnesses from a distance to London. Such considerations may cause local authorities to hesitate before taking steps which might result in legal costs and practical inconvenience out of proportion to the value of the right of way in question.

A cheaper and sometimes more convenient method is to commence proceedings in the county court, where, of course, all legal costs are on a lower scale, and there is no necessity for the parties and witnesses to incur the expense of travelling to and staying in the capital city.

Such proceedings may be commenced by the local authority taking out a summons against the owner claiming as damages the cost of carrying out their statutory duty of removing unlawful obstructions to the alleged public right of way, and asking for a declaration that the way is public. Such proceedings do not require the fiat of the Attorney-General. Similarly an owner can commence proceedings in a county court by taking out a summons claiming damages for trespass to his property, and asking for a declaration that the way is private.

ANOTHER RECENT CASE.

By such methods a local authority or an owner can obtain a judicial decision as to the legal status of a way without incurring the substantial costs and inconvenience of an action in the High Court. A recent instance of such proceedings in which the author appeared as counsel, and which attracted some public interest was the case of *The Duke of Wellington v. Basingstoke R.D.C.*, which was tried last year in Basingstoke County Court. The Basingstoke R.D.C. had asserted a public right of way at Silchester across what was formerly the old Roman city of Calleva Atrebatum and is now part of the settled estates of the Dukes of Wellington. The district surveyor, in pursuance of the

instructions of his council and after due notice to the persons concerned, removed a barbed wire barrier obstructing the way, and the chairman of the parish council and a number of the inhabitants then processed over the way with vehicles and on foot claiming a public right. The Duke thereupon commenced an action for trespass in the local county court, claiming a small sum for damages and an appropriate declaration, and thus secured a judicial decision without the expense or inconvenience of a High Court action.

The author has endeavoured in this paper to indicate the various methods by which private and public rights of way may originate. Particular reference has been made to *public* rights of way and to how they may be legally established or rebutted. Especial consideration has been given to the legal effect of the *Rights of Way Act, 1932*, and to the important decision of the Court of Appeal in the recent leading case of *Jones v. Bates*. In conclusion attention has been drawn to the duty of district councils to protect public rights of way and the steps that may be taken to secure the satisfactory determination of questions that may arise in this connection.

It has not been possible within the limits of this paper to deal with all aspects of a branch of law which admittedly presents a number of difficulties, but it is hoped that the foregoing remarks may be of interest and possibly of some assistance to those who are responsible for protecting the rights of the public and of owners respectively.